Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

ALVARO BOLANOS-MUNOZ, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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May 24, 2006

* The full list of Petitioners is set forth in the List of Parties, Infra p. ii.

QUESTION PRESENTED

Whether a defendant, whose sentence involved statutory and/or constitutional error under this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), must show, under the third prong of plain-error review, that there was a reasonable probability of a different result if the U.S. Sentencing Guidelines were merely advisory, rather than mandatory.

PARTIES TO THE PROCEEDING

The Petitioners are Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz. Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

PARTIES TO THE PROCEEDING II

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED IN THEIR APPROACH TO PLAIN-ERROR REVIEW UNDER *BOOKER*. 8

II. THE COURTS OF APPEALS' VARYING APPROACHES TO PLAIN-ERROR REVIEW UNDERMINE FUNDAMENTAL PRECEPTS OF FAIRNESS IN SENTENCING. 12

III. THIS CASE IS AN EXCELLENT VEHICLE TO BRING UNIFORMITY TO *BOOKER* PLAIN-ERROR REVIEW AMONG THE COURTS OF APPEALS. 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 5
Blakely v. Washington,
542 US 296 (2004) 5, 7
Bolanos-Munoz v. United States,
543 U.S. 1109 (2005) 3, 6
Chapman v. United States,
500 U.S. 453 (1991) 13
Johnson v. United States,
520 U.S. 461 (1997) 6
Koon v. United States,
518 U.S. 81 (1996) 13, 17
Rodriguez v. United States,
cert. denied, --- U.S. ---,125 S. Ct.
2935 (2005) 18, 22
Strickland v. Washington,
466 U.S. 668 (1984) 18
United States v. Ameline,
409 F.3d 1073 (9th Cir. 2005) 10, 11, 15
United States v. Antonakopoulus,
399 F.3d 68 (1st Cir. 2005) 11, 22
United States v. Barnett,
398 F.3d 516 (6th Cir. 2005) 9, 16
United States v. Bolanos-Munoz,
103 Fed. App'x. 665 (11th Cir. 2004) 5
United States v. Booker,
543 U.S. 220 (2005) ..... passim
United States v. Bruce,
396 F.3d 697 (6th Cir. 2005) 22
United States v. Cartwright,
413 F.3d 1295 (11th Cir. 2005) 12
United States v. Coles,
403 F.3d 764 (D.C. Cir. 2005) 10

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Cotton,
535 U.S. 625 (2002) 6
United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) 10, 16
United States v. Davis,
407 F.3d 162 (3d Cir. 2005) 9, 10
United States v. Dazey,
403 F.3d 1147 (10th Cir. 2005) 11, 12
United States v. Dominguez Benitez,
542 U.S. 74 (2004) 18
United States v. Fields,
408 F.3d 1356 (11th Cir. 2005) 12
United States v. Gonzalez-Huerta,
403 F.3d 727 (10th Cir. 2005) 14
United States v. Greer,
375 F. Supp. 2d 790 (E.D. Wis. 2005) 17
United States v. Heldeman,
402 F.3d 220 (1st Cir. 2005) 12
United States v. Hughes,
396 F.3d 374, 381 n.7 (4th Cir. 2005) 10
United States v. Mares,
402 F.3d 511 (5th Cir. 2005) 11
United States v. Milan,
398 F.3d 445 (6th Cir. 2005) 9
United States v. Neufeld,
154 Fed. Appx. 813 (11th Cir. 2005) 17
United States v. Olano,
507 U.S. 725 (1993) 22
United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 10, 18
United States v. Pirani,
406 F.3d 543 (8th Cir. 2005) 9, 22
United States v. Rodriguez,
398 F.3d 1291 (11th Cir. 2005) ..... passim

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001).....6
United States v. Shelton,
400 F.3d 1325 (11th Cir 2005).....9, 22
United States v. Thompson,
422 F.3d 1285 (11th Cir. 2005).....11, 15, 16
United States v. White,
405 F.3d 208 (4th Cir. 2005).....10

Statutes

18 U.S.C. § 3553 .....13, 15, 17, 21
21 U.S.C. § 841 .....3, 4
28 U.S.C. § 1254(1) 1
28 U.S.C. § 994 13
46 U.S.C. App. § 1903 .....3, 4

Other Authorities

108 Cong. Rec. S8573
(daily ed. July 21, 2004).....13
Douglas A. Berman, *Balanced And Purposeful Departures: Fixing A Jurisprudence That Undermines The Federal Sentencing Guidelines*,
76 NOTRE DAME L. REV. 21 (2000) 17
James M. Anderson et al.,
Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines,
42 J.L. & ECON. 271 (1999).....14
Kate Stith & Jose A. Cabranes,
FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998) 12

TABLE OF AUTHORITIES (Cont.)

Page(s)

Michael W. McConnell, *The* Booker *Mess*,
83 DENV. U. L. REV. 665 (2006) 17
SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 21
Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*,
17 HOFSTRA L. REV. 1 (1988).....14
U.S.S.G Ch. 5, Pt. A.....20
U.S.S.G. § 3B1.2.....5, 21
U.S.S.G. §§ 5H1.1-5H1.6 16
United States Sentencing Guidelines
§ 2D1.1(b)(2)(B) (2001).....2, 4, 19

Rules

Federal Rule of Criminal Procedure 52(b).....2

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PETITION FOR WRIT OF CERTIORARI

Petitioners Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 2006 WL 460931.

JURISDICTION

The judgment of the court of appeals affirming petitioners' convictions and sentences was entered on February 27, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

> A plain-error that affects substantial rights may be considered even though it was not brought to the court's attention.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Sentencing Guidelines ("U.S.S.G.") § 2D1.1(b)(2)(B) (2001) provides in relevant part:

> If the defendant unlawfully imported or exported a controlled substance under circumstances in which *** the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

STATEMENT

Petitioners Alvaro Bolanos-Munoz and Rodrigo Bolanos-Munoz were found guilty by a jury of intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction and conspiracy to commit the same on May 23, 2002. Alvaro and

Rodrigo were sentenced to 292 months' imprisonment and 235 months' imprisonment, respectively, before the decision of this Court in *United States v. Booker*, 543 U.S. 220 (2005). Alvaro's sentence was adjusted upwards by two levels based on a fact not in the indictment or found by the jury beyond a reasonable doubt. Ricardo was denied a possible downward departure because the Guidelines discouraged or prohibited reliance on specific mitigating factors.

Petitioners appealed their sentences and convictions to the Eleventh Circuit Court of Appeals, which affirmed their convictions and sentences. Subsequently, this Court vacated the Eleventh Circuit's decision and remanded the case for further consideration in light of *Booker*. *Bolanos-Munoz v. United States*, 543 U.S. 1109 (2005). On remand, the court of appeals reviewed petitioners' sentences for plain-error, Fed. R. Crim. P. 52(b), because petitioners failed to raise their objections in the trial court. Pet. App. 2a. Finding no evidence in the record that the district court would have imposed a different sentence had it known that the Guidelines were advisory, the court of appeals held that petitioners' sentences did not affect their substantial rights, as is required under the third prong of plain-error review, and consequently re-affirmed petitioners' sentences. *Id.* at 3a.

1. Petitioners were aboard the *Recuerdo*, a Colombian fishing vessel, when the vessel was searched by the U.S. Coast Guard on August 2, 2001. The Coast Guard's search uncovered substantial amounts of cocaine stored in a hidden compartment in the craft. Petitioners and others aboard the vessel were then arrested and transferred to a Navy vessel for transport to the Middle District of Florida for prosecution.

2. On August 9, 2001, petitioners were indicted and charged with (1) possession with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1903(a) and 21 U.S.C. § 841(b)(1)(A)(ii); and

(2) conspiracy to possess with intent to distribute cocaine while aboard a vessel subject to U.S. jurisdiction, in violation of 46 U.S.C. App. § 1903(a), (j), and 21 U.S.C. § 841(b)(1)(A)(ii). On May 23, 2002, a jury found petitioners guilty of both counts.

3. After rejecting petitioners' emergency motion to obtain new counsel and to stay the sentencing hearing, petitioners were sentenced on October 7, 2002.

a. Applying the then mandatory Sentencing Guidelines, the court imposed a sentence of 292 months' imprisonment on Alvaro Bolanos-Munoz; the lowest possible sentence for an offense level of 40 and a criminal history category of 1. Over counsel's objection,[1] Alvaro's sentence was enhanced by two offense levels based on the court's finding that he was a "captain...aboard [a] craft or vessel carrying a controlled substance." *See* U.S.S.G § 2D1.1(b)(2)(B). The court's finding that Alvaro was the ship's captain was not asserted in the indictment and was never the subject of the jury's deliberations or findings.

In response, the Government asserted that the question of who was responsible for the drugs is different from the question of who was responsible "as the captain for getting the vessel to where it needs to go." 10/7/02 Sent. Tr. 15. Despite that distinction, the government conceded that Alvaro was not steering the ship when it was boarded. *Id.* at 16. The court added that Alvaro was just the "de facto captain" of the vessel, and it was another man who was "actually running the boat." *Ibid.* Despite these findings, the court denied Alvaro's motion. *Ibid.*

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[1] 10/7/02 Sent. Tr. 13-14. Counsel also made a number of other objections to the Pre-Sentence Investigation Report. *Id.* at 10-13. The court relied solely on Alvaro's status as the "captain" of the *Recuerdo* in enhancing his sentence.